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Tribes of the Colville Reservation*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION *et*
al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

vs.

NATIONAL MARINE FISHERIES SERVICE
et al.,

Defendants,

And

NORTHWEST IRRIGATION UTILITIES,
et al.,

Intervenor-Defendants.

Case No. CV01-640-RE (Lead Case)
Case No. CV05-0023-RE
(Consolidated Cases)

**AMICUS BRIEF OF COLVILLE
TRIBES IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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I. INTRODUCTION

Amicus curiae Confederated Tribes of the Colville Reservation (the “Colville Tribes” or the “Tribes”) submit this brief in support of the Federal Defendants’ motion for summary judgment. The Colville Reservation is located in north-central Washington and presently consists of approximately 1.5 million acres bounded by the Okanogan and Columbia Rivers. The Reservation includes two major components of the Federal Columbia River Power System (FCRPS), Chief Joseph and Grand Coulee Dams, both of which completely block anadromous fish passage. Their associated reservoirs, Lake Rufus Woods and Lake Roosevelt, have inundated thousands of acres of the most economically important and culturally significant Tribal lands.¹

Historically, the Colville Tribes were salmon people. Their culture and subsistence were intricately linked with anadromous fish runs in the upper Columbia River and the fisheries they provided. The development of the FCRPS has had devastating impacts on these fish runs and the Tribes’ fisheries and way of life. The FCRPS completely blocks anadromous fish passage upstream of Chief Joseph Dam, cutting off access to hundreds of miles of productive spawning and rearing habitat. In addition, four federal and five non-federal dams downstream of the Reservation kill out-migrating juveniles and returning adults. The effects of these nine mainstem dams, compounded by local habitat loss and unwise hatchery practices, have led to the extirpation of spring Chinook salmon and the near extirpation of steelhead in the Okanogan River basin, the only Reservation watershed not completely blocked by federal dams. Since the late 1990s, two evolutionarily significant units (ESUs) whose range encompasses the Colville

¹ See Declaration of Joe Peone (“Peone Decl.”) ¶ 3; see also Colville MOA (Corps Administrative Record (AR) A.394) at 1-2.

Reservation, Upper Columbia River (UCR) spring Chinook salmon and UCR steelhead trout, have been listed as “endangered” under the Endangered Species Act (ESA). The Tribes’ annual salmon and steelhead harvest now averages about 1,000 fish, about one fish for every nine Tribal members.²

The Tribes have vital interests in the recovery of the Upper Columbia River (UCR) spring Chinook salmon and steelhead ESUs. However, the Tribes are convinced that recovery will be best achieved by continuing the collaboration process begun with the Court’s remand order, not through further litigation. In taking this position, the Tribes acknowledge that plaintiffs’ prior efforts have forced the federal agencies to make serious efforts to reduce dam mortality and devote hundred of millions of dollars for habitat and hatchery actions needed to mitigate impacts from the dams. It is time, however, to put litigation aside for the next ten years and allow the sovereign parties to solidify these gains through implementation of the on-the-ground recovery efforts provided for in the 2008 Biological Opinion (BiOp) and the Columbia River Fish Accords.

II. THE COLLABORATION PROCESS

When the Colville Tribes entered into the Court-ordered collaboration process, little progress had been made towards the recovery of endangered UCR spring Chinook salmon and steelhead relative to listed salmon and steelhead elsewhere in the Columbia Basin. Available federal mitigation funding, federal dam improvements, and recovery strategies were focused on

² Peone Decl. ¶¶ 5-6; *see also* Colville MOA (Corps AR A.394) at 2; Okanogan Anadromous Fish Recovery Initiative (Reclamation AR at 74568).

the watersheds of the lower Columbia and Snake Rivers. In addition, federal research to improve passage survival was targeted on Snake River species.³

The Colville Tribes' main objectives in the collaboration process were to ensure that the BiOp would adequately address the survival and recovery of UCR spring Chinook salmon and steelhead, and direct needed attention to restoring steelhead and spring Chinook salmon in the Okanogan River basin. The Tribes also hoped to assure that changes to FCRPS operations intended to aid salmon and steelhead survival throughout the Columbia Basin would not unnecessarily affect Lake Roosevelt, a critical part of the Colville Reservation.⁴

The Colville Tribes were active participants in the collaboration process and made important contributions to the Policy Working Group and various technical committees and ad hoc workgroups. The Colville Tribes provided numerous and substantial comments to the federal agencies throughout the collaboration process, seeking to awaken the federal government to the recovery needs of the endangered UCR spring Chinook and steelhead ESUs, particularly the largely extirpated Okanogan populations of these species. In February 2007, the Tribes criticized an early draft of the proposed action as "severely inadequate in addressing the survival and recovery of UCR Spring Chinook and UCR Steelhead." Letter, Peone to Wirkus et al. (Feb. 2, 2007) (Corps AR C.15599). Again in January 2008, the Tribes identified key deficiencies in the Reasonable and Prudent Alternatives (RPAs) provided for in the draft BiOp to meet the

³ Peone Decl. ¶ 9.

⁴ Peone Decl. ¶ 10.

needs of UCR spring Chinook and steelhead.⁵ Letter, Peone to Lohn (Jan. 4, 2008) (NOAA AR C.915).

As NOAA Fisheries finalized the BiOp, the Colville Tribes entered into negotiations with the Bonneville Power Administration, the Army Corps of Engineers and the Bureau of Reclamation (the “Action Agencies”) to seek agreement on additional measures that would address the Tribes’ concerns regarding the UCR spring Chinook and steelhead ESUs. The negotiations focused on implementation of the Tribes’ Okanogan Initiative (Reclamation AR 74565-74629), which provided the Action Agencies with extensive and concrete opportunities for habitat improvements, safety-net propagation programs, hatchery reforms, and spring Chinook salmon reintroductions that would help achieve the survival and eventual recovery of these two endangered ESUs. The outcome of this negotiation process was a Memorandum of Agreement (MOA), one of several which make up what are now known as the Columbia Basin Fish Accords.⁶ Corps AR A.394.

The Colville MOA provides greater certainty that habitat and hatchery measures provided for in the Proposed Action and the Biological Opinion will actually be implemented and provide real, measurable benefits to the listed species. In addition, the MOA provides for additional, specific habitat and hatchery actions that will lead to restoration and the eventual recovery of the Okanogan populations of UCR steelhead and spring Chinook salmon. The MOA provides a

⁵ Peone Decl. ¶¶ 13, 17, 19, 20. These included: (a) a lack of adequate focus and mitigation actions for those ESUs with the greatest survival gaps; (b) the need for significantly more measures to increase productivity of UCR steelhead as the prospective recruits per spawner metric was still expected to be substantially less than the minimum threshold of 1.0 needed to achieve a trend towards recovery; (c) the need for further investigations of dry water year flow strategies and passage losses of UCR spring Chinook and steelhead; (d) the need for greater funding certainty for additional mitigation measures; and (e) the need for a new regional governance process to oversee implementation of these measures. *Id.* ¶ 20; Letter, Peone to Lohn (Jan. 4, 2008) (NOAA AR C.915).

⁶ Peone Decl. ¶ 18, 22, 23; Colville MOA (Corps AR A.394) at B-1 – B-2.

nearly 14-fold increase in annual funding for habitat and safety-net hatchery actions in the Okanogan watershed. With these funds, the Tribes anticipate increasing the amount of accessible steelhead habitat in the Okanogan River basin by 140 to 400 percent in just ten years through the implementation of Okanogan Initiative projects that will restore tributary stream flows and address other factors limiting steelhead and spring Chinook production.⁷

Complementing these extensive habitat improvements will be a propagation program to reintroduce UCR spring Chinook back into the restored tributary habitats in the Okanogan basin. The MOA also provides a ten-fold increase in funding for the Tribes' local steelhead broodstock and kelt reconditioning program that will ensure that steelhead in Okanogan are better adapted and substantially more productive in the restored habitats. Additionally, the MOA doubles the available funding for monitoring and evaluation to measure the effectiveness of these programs and modify them as needed.⁸

With the added certainty provided by the MOA, the final BiOp meets the Tribes' concerns about the Proposed Action and draft BiOp. Action Agency mitigation funding is now clearly being focused on those ESUs with the greatest survival gaps. Habitat and safety-net hatchery funding and mainstem passage improvements will allow an Okanogan population of spring Chinook salmon to be reestablished and the existing wild Okanogan steelhead population to survive and productively grow in significantly expanded and improved habitats.⁹

⁷ Peone Decl. ¶ 24; Declaration of Steve Smith ("Smith Decl.") ¶¶ 13, 20 ; *see also* Colville MOA (Corps AR A.394) at 8-10, Appendix A, B-1 – B-5; Okanogan Initiative (Reclamation AR 74570-74610).

⁸ Peone Decl. ¶ 24; Smith Decl. ¶¶ 14-18; Colville MOA (Corps AR A.394) at Appendix A, B-1 – B-2, B-5 – B-6; Okanogan Initiative (Reclamation AR 74610-74612).

⁹ Peone Decl. ¶ 25; Smith Decl. ¶ 22-23; Colville MOA (Corps AR A.394) at B-1 – B-2.

Based on the funding and certainty provided by the MOA, and the enhanced attention on recovery of UCR spring Chinook and steelhead in the Okanogan Basin, the Colville Tribes have decided to support the 2008 BiOp. In particular, the Colville Tribes fully support NOAA's ESU-by ESU approach to the jeopardy analysis and the "trending toward recovery" metric used by NOAA Fisheries to evaluate the effects of the FCRPS operations on the listed ESUs. Given the enormous impact of the FCRPS on the listed ESUs, it is necessary that the proposed action at very least achieve a "trend towards recovery" for each listed species so as to ensure both long-term survival and the potential for full recovery. Achieving a positive trend goes well beyond reducing the trajectory to eventual extinction, which was apparently the focus of earlier consultations. See *Idaho Department of Fish and Game v. NMFS*, 850 F. Supp. 886, 899 (D. Or. 1994). The Colville Tribes see no other practical interpretation of the jeopardy standard that both ensures short term survival and provides an adequate potential for recovery. Because this pragmatic standard is now being applied to all other consultations of major federal actions affecting UCR spring Chinook salmon and steelhead, including harvest in the lower Columbia River, the Colville Tribes believe that over time, full recovery will be achievable.¹⁰

III. ARGUMENT

The Colville Tribes' amicus brief addresses the following issues: (1) whether the "trending toward recovery" standard used in the 2008 BiOp is consistent with the ESA and its implementing regulations; (2) whether NOAA's analysis improperly considered future hatchery actions that had yet to undergo Section 7 consultation; (3) whether NOAA's analysis considered the effects of non-federal habitat actions that were not "reasonably certain to occur"; (4) whether

¹⁰ See Supplemental Comprehensive Analysis (SCA) at 1-3, 2-3 (same analytical framework will be applied to FCRPS operations, Section 10(a)(1)(A) Transportation Permit, Reclamation's Upper Snake proposed action, and *U.S. v. Oregon* harvest management plan); *U.S. v. Oregon* Management Agreement BiOp (NOAA AR B.377) at 7-3.

the NOAA's jeopardy analysis was arbitrary, capricious or contrary to law; (5) whether NOAA's critical habitat analysis meets ESA requirements; and (6) whether the Action Agencies are required to obtain water quality certifications under Section 401(a) of the Clean Water Act as a prerequisite for FCRPS operations. As discussed below, none of plaintiffs' claims are weighty enough to overturn the thousands of hours of collaborative work that have gone into the 2008 BiOp and the Columbia River Fish Accords.

A. NOAA's Analysis Is Consistent with the Section 7 Jeopardy Standard.

Plaintiffs' first claim is that NOAA applied the wrong standard when assessing whether FCRPS operations will "jeopardize the continued existence" of the listed species. NWF Brf. at 5-20. Plaintiffs principally maintain that the "trending toward recovery" standard that NOAA applied in the 2008 BiOp "fails to address the elements of a jeopardy analysis required by the [ESA] regulations." *Id.* at 7. Plaintiffs provide no legal authority in support of their position and propose no workable alternative to the "trending toward recovery" standard employed in the BiOp.

1. The Recovery Analysis in the 2008 BiOp Meets the Requirements of Section 7 and Its Implementing Regulations.

The Court's analysis of plaintiffs' recovery claim must start with the language of Section 7 of the ESA and its implementing regulations. Section 7 of the ESA prohibits agency action that is "likely to jeopardize the continued existence of" any listed species. 16 U.S.C. § 1536(a)(2). The ESA regulations interpret this to prohibit any agency action "that reasonably would be expected, directly or indirectly, reduce appreciably the likelihood of *both the survival and recovery* of a listed species in the wild." 50 C.F.R. § 402.02 (emphasis added).

This statutory and regulatory language “requires [NOAA Fisheries] to consider both recovery and survival impacts.” *National Wildlife Federation v. NMFS*, 524 F.3d 917, 931 (9th Cir. 2008). Contrary to plaintiffs’ suggestions, however, consideration of recovery effects under Section 7 does not stand alone, but is intended to inform NOAA’s ultimate determination concerning whether the proposed action is “likely to jeopardize the continued existence” of the listed species. 16 U.S.C. § 1536(a)(2). As the Ninth Circuit has emphasized, jeopardy is a “*joint* survival and recovery concept” and the recovery effects warrant a jeopardy finding only in the “exceptional circumstances” that they “rise to the level of ‘jeopardizing’ the ‘continued existence’ of a listed species.” *Id.* at 932 (citing 51 Fed. Reg. 19,934).

Also contrary to plaintiffs’ suggestions, the jeopardy standard is not a broad mandate requiring federal agencies to ensure the recovery of listed species that may be affected their proposed actions. Rather, Section 7 is focused on ensuring that new federal actions will not jeopardize the existence of listed species. As the Ninth Circuit has explained, “[a]gency action can only ‘jeopardize’ a species’ existence if that agency action *causes some deterioration in the species’ pre-action condition.*” *NWF*, 524 F.3d at 930 (emphasis added). Thus, “an agency only ‘jeopardize[s]’ a species if it causes some *new* jeopardy.” *Id.* (emphasis added). Where baseline conditions already jeopardize a species, Section 7 prohibits only those new actions that “deepen[] the jeopardy by causing additional harm.” *Id.*

In contrast to the litigation regarding the 2004 BiOp, Plaintiffs no longer can credibly argue that NOAA failed to “consider” recovery impacts. *NWF*, 524 F.3d at 931. Instead, they now take issue with the procedures and methods NOAA used to evaluate these impacts. Plaintiffs maintain that instead of analyzing whether the relevant ESUs would be “trending toward recovery,” NOAA should have analyzed “(1) the population level (and growth or survival

rate) that is necessary to achieve recovery; (2) when that population level is expected to be achieved; and, (3) what probability (i.e., ‘likelihood’) of achieving the population target in the desired time frame is required to allow the agency to conclude that the action does not ‘appreciably reduce’ the likelihood that recovery will occur.” NWF Brf. at 9-10.

This Court, however, may not impose on NOAA “procedural requirements” that are not “explicitly enumerated” in the ESA or its implementing regulations. *The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (quoting *Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 818 (9th Cir.1990); *Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir.2001)). Plaintiffs’ proposed three-step analysis cannot be found anywhere in the relevant statutes or regulations. In this situation, this Court must pay deference to the procedures and methods NOAA used to evaluate recovery impacts “as long as they are reasonable.” *McNair*, 537 F.3d at 993 (court must “defer to an agency’s determination in an area involving a ‘high level of technical expertise,’” especially “when the agency is ‘making predictions, within its [area of] special expertise, at the frontiers of science’”); *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir.2003); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir.2003).

The procedures and methods NOAA used in its jeopardy analysis were reasonable. First, NOAA analyzed whether the “[s]hort term extinction risk is sufficiently low to meet the survival prong of the jeopardy standard.” 2008 BiOp at 7-5. Next, NOAA considered whether there was an adequate potential for recovery, i.e. “[t]he populations within a species are expected to be on a trend toward recovery.” *Id.* Only if the short-term risk of extinction was sufficiently small *and* there was an adequate potential for recovery did NOAA conclude that the proposed action was not likely to “jeopardize the continued existence” of the ESU in question. *Id.*

While plaintiffs take issue with the second prong of NOAA’s analysis, the “trending toward recovery” metric for analyzing recovery potential is a reasonable method for determining whether a proposed federal action will appreciably reduce the likelihood of recovery of listed salmon or steelhead ESUs. The “trending toward recovery” metric essentially asks whether, given the effects of the proposed action, the environmental baseline, and any cumulative effects that are “reasonably certain to occur,” the number of returning spawners in the future is likely to be greater than the levels prevalent under current conditions. See 2008 BiOp at 7-22 through 7-26. Where the number of returning fish in an ESU is currently declining, a “trending toward recovery” analysis requires the Action Agencies to “reverse the trend toward species extinction” and put the ESU back on a positive trend toward recovery. *American Rivers v. NOAA Fisheries*, 2006 WL 1455629 *10 (D. Or. 2006) (quoting *TVA v. Hill*, 437 U.S. 153, 184-85 (1978)). By tying a “no jeopardy” determination to a finding that the number of returning fish in an ESU is likely to increase over base and current conditions, the “trending toward recovery” analysis ensures that the proposed action will neither “cause[] some new jeopardy” nor “deepen[] the jeopardy by causing additional harm.” *NWF*, 524 F.3d at 930. That is exactly what the law requires.¹¹

2. No Legal Authority Supports Plaintiffs’ Attack on the Trending Toward Recovery Analysis.

No legal authority supports plaintiffs’ claim that the “trending toward recovery” analysis is arbitrary and unlawful. In support of their claim, Plaintiffs mistakenly rely on the portion of

¹¹ Plaintiffs wrongly claim that the “trending toward recovery” standard has not been applied in any other consultation that NOAA has undertaken before or since. *NWF* Brf. at 6. Plaintiffs overlook that the same framework was applied to the consultation for the *U.S. v. Oregon* harvest management agreement completed at the same time as the consultation for the FCRPS. See Supplemental Comprehensive Analysis (SCA) at 1-3, 2-3; *U.S. v. Oregon* Management Agreement BiOp (NOAA AR B.377) at 7-3.

the Ninth Circuit’s opinion holding that the 2004 BiOp “inappropriately evaluated recovery impacts without knowing the in-river survival levels necessary to support recovery.” *NWF*, 524 F.3d at 936. The Ninth Circuit reasoned that it was “logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from ‘significant’ impairments to habitat that is already severely degraded.” *Id.* Importantly, however, the Court emphasized that its holding did not import the ESA’s separate recovery planning provisions into the Section 7 consultation process, but was intended only to provide “some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger.” *Id.*

The “trending toward recovery” metric in the 2008 BiOp meets these requirements. Under this standard, survival and recovery logically are “put at risk” when the number of returning adult spawners is consistently less than that of the preceding generation, *i.e.* the species is on downward trend toward extinction. *See* 2008 BiOp at 7-22 through 7-26. The BiOp also includes, as an RPA, “performance standards” for both adult and juvenile survival that, if met, would allow sufficient numbers of populations of each ESU to increase over time. Biological Assessment (BA) (NOAA AR B.89) at 2-5 – 2.6; 2008 BiOp, RPA Table at 72-73. By requiring that there will be more listed fish in future generations than in the present generation, the “trending toward recovery” standard provides “reasonable assurance” that FCRPS operations over the next ten years will not “appreciably reduce the odds of success of future recovery planning by tipping a listed species too far into danger.” *NWF*, 524 F.3d at 936.

Plaintiffs also cite a footnote from *ALCOA v. BPA*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999) where the Court rejected the claim that a “no jeopardy” opinion could be based on

incremental improvements where a species “already stands on the brink of extinction, and the incremental improvements pale in comparison to the requirements for survival and recovery.” Here, however, NOAA’s jeopardy analysis cannot be satisfied simply showing that the proposed action is less harmful than the status quo. Instead, NOAA’s methodology requires a showing that the RPAs are sufficient to close the “survival gap” and thereby allow each ESU to increase in abundance and productivity over the life of the BiOp. 2008 BiOp at 7-7.

Plaintiffs also rely heavily on Judge Marsh’s observation in that an incremental improvement in juvenile survival rates may not be sufficient to avoid jeopardy where the improved “survival level may still be considered so low as to constitute a continued threat to the species’ existence.” *IDFG v. NMFS*, 850 F. Supp. at 899. But, contrary to plaintiffs’ suggestion, the “trending toward recovery” analysis requires far more than mere incremental improvements in juvenile survival rates. The “trending toward recovery” analysis is based on metrics (such as spawner/recruit ratios and population growth rates greater than 1.0) that ensure not only that survival rates increase, but that the increase in survival is sufficient to allow for sustained improvement, *i.e.* a trend toward recovery, in the status of imperiled populations.

Plaintiffs also quote out of context the latter portion of a sentence from the “Consultation Handbook” to support their attack on NOAA’s analytical methods. NWF Brf. at 10. The entire sentence, which appears in a section titled “Population Size” reads:

Reduction in population size may jeopardize the continued existence of threatened or endangered species because the longer a species remains at low population levels, the greater the probability of extinction from chance events, inbreeding depression, or additional environmental disturbance.”

Consultation Handbook at 4-21 (emphasis added). Here, NOAA’s recovery analysis requires a showing that the population size will *increase* and does not allow NOAA to issue a “no

jeopardy” opinion in the face of a “reduction in population size.”¹² It is thus entirely consistent with the Consultation Handbook.

Both plaintiffs and the Nez Perce Tribe maintain that the “trending toward recovery” analysis is inconsistent with the definitions of “survival” and “recovery” in the Consultation Handbook. *See* NWF Brf. at 13; Nez Perce Brf. at 10-11 (citing Consultation Handbook at 4-35).¹³ Plaintiffs apparently maintain that “survival” and “recovery” are entirely separate concepts and that NOAA erred by analyzing recovery impacts using the “potential for recovery” concept found in the Handbook’s definition of “survival.”¹⁴

Plaintiffs’ definitional argument, however, ignores the most important definition – the definition of “jeopardy” in the ESA regulations. 50 C.F.R. § 402.02. Under the consultation regulations, the jeopardy standard is intended to serve as a “*joint* survival and recovery concept.” *NWF*, 524 F.3d at 932 (citing 51 Fed. Reg. 19,934). Thus, while the regulations require NOAA to consider recovery impacts, they require a jeopardy finding only in the “exceptional circumstances” that recovery effects “rise to the level of ‘jeopardizing’ the ‘continued existence’ of a listed species.” *Id.* Since recovery effects are dispositive in the jeopardy analysis only where the “continued existence” of the species is jeopardized, it was entirely appropriate for NOAA to analyze recovery effects based on the “potential for recovery” concept found in the Consultation Handbook’s definition of “survival.”

¹² Plaintiffs also point out that since small populations are more vulnerable than larger populations, small populations that are recovering slowly face a higher risk of extinction. While true, NOAA separately analyzed the risk of extinction for each ESU using both qualitative and quantitative factors. *See* 2008 BiOp at 7-5.

¹³ In the version of the Consultation Handbook available on the internet, these definitions are found at pages 4-36 and 4-37. http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf.

¹⁴ As NOAA explained, the “trending toward recovery” analysis is an important way of resolving the ultimate question of whether the effects of the proposed action leave the species with an “adequate potential for recovery.” *See* 2008 BiOp at 1-12 (emphasis added).

3. Plaintiffs' Alternative to NOAA's Analysis Is Contrary to Law and Unworkable.

While plaintiffs vigorously attack the recovery prong of the analysis in the 2008 BiOp, their proposed three-step analysis is not a workable alternative. Although recovery targets certainly can be and have been set for different populations and ESUs, there is no statutory or regulatory guidance for determining either the appropriate *time* for recovery or what constitutes an “appreciable reduction” in that time period. Plaintiffs’ proposed three-step method would only inject additional uncertainty and subjectivity into the recovery analysis leading to further controversy and litigation.¹⁵

Plaintiffs suggest that an action “appreciably reduces” the likelihood of recovery if it would result in a population growth rate that is less than required to attain a viable population within some desired time frame for recovery. Under plaintiffs’ theory, an “appreciable reduction” in the likelihood of recovery would be measured against an ideal situation where all federal and non-federal actors take unspecified actions that lead to recovery within that desired time frame.¹⁶ Even assuming that there were some recognized standard on the appropriate time for recovery or what constitutes an “appreciable reduction,” this standard is contrary to law.

In most cases, full recovery of a listed species will require voluntary actions by many federal and non-federal actors that go far beyond the scope of the proposed federal action subject to Section 7 consultation. In this common situation, plaintiffs’ standard would make a “no

¹⁵ Plaintiffs fail to state what the appropriate timeframe for recovery should be. *See* NWF Brf. at 15 (mentioning both a 48- and 100-year period). Plaintiffs also acknowledge that they challenged NOAA’s application of their preferred analytical methodology in the litigation challenging the 2000 BiOp. *Id.* at 14-15 n.9 (NWF challenged NOAA’s use of a 50 percent probability as a metric for what constitutes an “appreciable reduction” in the likelihood of recovery).

¹⁶ *See* NWF Brf. at 15 n. 10 (noting that 2000 BiOp set performance standards that would measure whether the RPA was actually achieving the population growth rates determined necessary to avoid an appreciable reduction in the likelihood of recovery).

jeopardy” determination unattainable unless the action agency secures affirmative commitments from other federal and non-federal actors to undertake positive actions needed to ensure species recovery. The analysis demanded by plaintiffs would thus shift the focus of Section 7 consultations away from ensuring that the proposed federal action subject to consultation does not “jeopardize the continued existence” of (*i.e.* cause additional harm to) the listed species. Instead, the Section 7 consultation process would require the action agency to secure actions and commitments from third parties that are sufficient to ensure full recovery of the listed species, or at least recover the species to an arbitrary point where a Court could determine that the likelihood of recovery has not been “appreciably reduced.” This goes far beyond what Congress intended when it adopted Section 7, which requires only that a federal agency insure that its *proposed action* will not jeopardize the “continued existence” of a listed species. *See Salmon Spawning Recovery Alliance v. Lohn*, 2008 WL 782851 (W.D. Wash. 2008), (“[t]o the extent recovery . . . is limited by current habitat conditions, it cannot be said that the operation of the [fishing plan] at issue in this case is appreciably reducing the likelihood of recovery”).

It is true that NOAA attempted to employ something akin to plaintiffs’ proposed methodology in its 1995 and 2000 BiOps. *See* NWF Brf. at 18-19. However, as plaintiffs concede, NOAA may change its analytical methodology if it provides a “reasoned analysis for the change.” NWF Brf. at 18-19 (quoting *Motor Vehicle Mfg. Ass’n v. State Farm Ins. Co.*, 463 U.S. 29, 41-42 (1983)). In this case, NOAA adequately explained why it employed the “trending toward recovery” analysis in lieu of the unworkable analysis employed in the 1990s. As NOAA explained, the earlier analytical framework for evaluating recovery impacts was not appropriate for use in this case because full recovery will: (1) take more than the ten-year period of the proposed action, (2) depend on additional federal and non-federal actions that are beyond the

control of the action agencies and are not “reasonably certain to occur,” and (3) depend on future, yet-to-be-determined federal actions that have yet to undergo Section 7 consultations. *See* July 12, 2006, Memo (NOAA AR B.343) at 3. As NOAA further pointed out, “achieving recovery is not a requirement for avoiding jeopardy, but is instead the goal of [Section 4] recovery planning.” *Id.*

NOAA’s explanation is reasonable. As plaintiffs acknowledge, the recovery analysis employed in the 2000 BiOp depended on assumptions about the effects of future federal and non-federal actions over time frames as long as a century. *See* NWF Brf. at 12-13 (citing 2000 BiOp at 6-79). However, this Court made clear in its opinion overturning the 2000 BiOp that the analysis of effects in a jeopardy determination must be based *solely* on actions that are “reasonably certain to occur.” *National Wildlife Fed’n v. NMFS*, 254 F.Supp.2d 1196, 1213 (D. Or. 2003). Given the direction from the Court, NOAA properly chose to focus its jeopardy analysis on whether the “reasonably certain” effects of future federal and non-federal actions over the next ten years are likely to put ESUs on a trend toward recovery. As NOAA reasoned: “basing a prediction of recovery on a time span exceeding the ten year term of the proposed action is not consistent with the Court’s reading of the ESA consultation regulations, since at least some of the future Federal actions and non-federal activities that are likely to be needed for recovery of listed species cannot be reasonably certain to occur.” July 12, 2006, Memo (NOAA AR B.343) at 3. NOAA’s 2008 analysis, while perhaps less ambitious than what was attempted in the 2000 BiOp, was better grounded in reality and more likely to generate useful information for the agency’s jeopardy determinations. In light of the long time frame needed for recovery, the speculative nature of future actions that will be needed to attain recovery, and the lack of any ascertainable standards for determining the appropriate time for recovery or what constitutes an

“appreciable reduction” in the likelihood of recovery, NOAA’s decision to use the “trend toward recovery” framework for its recovery analysis in the current BiOp was both reasonable and adequately explained by the record.

B. NOAA Properly Considered the “Reasonably Certain” Effects of Future Hatchery Actions.

Plaintiffs next argue that NOAA’s jeopardy analysis improperly relied on future hatchery actions that have not undergone ESA consultation. NWF Brf. at 20-22. Plaintiffs’ argument is premised on the theory that “[t]he ESA’s implementing regulations prohibit NOAA from relying on the effects of future federal actions that have not undergone § 7 consultation in its jeopardy analysis.” *Id.* at 20. Plaintiffs misstate the requirements of the ESA regulations and mischaracterize NOAA’s analysis of future hatchery actions.

1. The ESA Regulations *Require* Consideration of the “Reasonably Certain” Effects of Future Federal Actions.

Contrary to plaintiffs’ argument, the ESA regulations *require* NOAA to consider the effects of future federal actions when such effects are both “caused by the proposed action” and “reasonably certain to occur.” Under ESA regulations, NOAA must evaluate both the “effects of the action” and “cumulative effects” on listed species and critical habitat.¹⁷ 50 C.F.R. § 402.14(g)(3); *see NWF*, 254 F.Supp.2d at 1205. The regulations define “effects of the action” to include both the “direct and indirect effects of the action . . . , together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R. § 402.02.

¹⁷ The term “cumulative effects” is defined to include the effects of future State or private activities, *not involving Federal activities*, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02 (emphasis added). Under this definition, the effects of federal hatchery activities are not “cumulative effects” for the purpose of Section 7 of the ESA.

The regulations define the term “environmental baseline” to include: (1) the past and present impacts of all Federal, State, or private actions and other human activities in the action area, (2) the anticipated impacts of *all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation*, and (3) the impact of State or private actions which are contemporaneous with the consultation in process. 50 C.F.R. § 402.02 (emphasis added). The ESA regulations further define “indirect effects” to be “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.*

Notably, the section 7 consultation requirement relied on by plaintiffs applies only to proposed Federal projects that are part of the “environmental baseline.” Nevertheless, the effects of future federal actions that have yet to undergo Section 7 consultation still must be considered in the jeopardy analysis as “indirect effects,” if they are “caused by the proposed action and “reasonably certain to occur.” 50 C.F.R. § 402.02.

Plaintiffs’ argument, which would bar NOAA from considering the effects of future federal actions that have not undergone Section 7 consultation, relies entirely on this Court’s decision overturning the 2000 BiOp because it relied on “federal range-wide, off-site mitigation actions that have not undergone section 7 consultation.” *NWF*, 254 F.Supp.2d at 1215. The Tribes respectfully point out, however, that the ESA regulations clearly provide that future federal actions must be considered in the jeopardy analysis *either* if such actions have undergone Section 7 consultation (in which case they are part of the “environmental baseline”) *or* if they have effects that are “caused by the proposed action” and are “reasonably certain to occur” (in which case they must be considered as “indirect effects”).¹⁸

¹⁸ The ESA regulations also flatly require that the effects of “interrelated” actions be considered in the jeopardy analysis, a requirement that avoids improper segmentation of the jeopardy analysis. *See Conner v. Burford*, 848 F.2d 1441, 1453-54 (9th Cir. 1988). Plaintiffs no doubt would rightly demand that the reasonably certain *adverse*

In short, plaintiffs' position that NOAA may not consider in its jeopardy analysis "the effects of future federal actions that have not undergone § 7 consultation" is based on a misreading of the regulation. NOAA *must* consider the effects of future federal actions that have not yet undergone Section 7 consultation, if the effects of these future federal actions are (1) "caused by the proposed action," and (2) "reasonably certain to occur."

2. NOAA Properly Considered the Effects of Future Hatchery Actions Funded under the RPA.

In this case, the Action Agencies consulted with NOAA regarding four Reasonable and Prudent Alternatives (RPAs) relating to federal hatchery programs. 2008 BiOp, RPA Table at 53-61. Under RPA 39, the Action Agencies must restructure their hatchery funding programs based on programmatic criteria that require implementation of Best Management Practices (BMPs) that will reduce the adverse effects of existing hatcheries on listed stocks. *Id.* at 53. Site specific application of these BMPs will be defined in hatchery management plans that will undergo further Section 7 consultations. *Id.* In addition, the Action Agencies must: undertake or fund specific, identified measures to ensure that hatchery programs funded by the Action Agencies as mitigation for the FCRPS are not impeding recovery, *id.* at 55 (RPA 40); continue to fund the operation of identified "safety net" programs for stocks at high risk of extinction, *id.* at 57 (RPA 41); and implement several new hatchery programs to assist in the recovery of certain ESA-listed stocks, *id.* at 59 (RPA 42).

The 2008 BiOp explains that the future implementation of BMPs in approved hatchery management plans would likely provide benefits to the listed species. 2008 BiOp at 8-35.

effects of interrelated federal actions should be considered in a jeopardy analysis even if such actions had not undergone Section 7 consultation. The same principle applies to the *beneficial* effects of future mitigation measures that are interrelated with the proposed action.

However, because many individual hatchery management plans have yet to be developed or undergo consultation, NOAA did not attempt to quantify these benefits in its jeopardy analysis.¹⁹ *Id.* at 8-35, 8-37. Nevertheless, NOAA did rely *qualitatively* on RPAs requiring hatchery reforms and improvements in its overall ESU-by-ESU analysis. *Id.* at 8-37. For example, NOAA concluded that RPA 42, which calls for development of a local steelhead broodstock in the Methow and Okanogan Rivers, is expected to improve the productivity of the Upper Columbia steelhead ESU. *Id.* at 8.7-40.

NOAA's qualitative consideration of the effects of the hatchery RPAs was entirely appropriate under ESA regulations. To begin with, NOAA *did* consult with the Action Agencies as part of the proposed action on programmatic measures to improve the performance of hatchery funding programs, including the development of programmatic criteria and BMPs. 2008 BiOp, RPA Table at 53. Although the precise benefits of these programs could not be quantified without further planning and site-specific analysis, it was appropriate for NOAA to give at least some *qualitative* consideration to the effects of these programs in its analysis. Even under plaintiffs' legal theory, because these RPAs have undergone programmatic consultation, they must be considered in the jeopardy analysis.

More importantly, under ESA regulations requiring analysis of "indirect effects," it was necessary and appropriate for NOAA to consider the "reasonably certain" effects of future federal hatchery actions that bear a causal relationship to the proposed action. In this case, both the causal link and reasonable certainty is supplied both by the BiOp itself and by the Columbia River Fish Accords which require funding of many of the future hatchery actions provided for in

¹⁹ Benefits were only credited for *on-going* "safety-net" hatchery programs needed to assure survival of Snake River sockeye and spring/summer Chinook, and Upper Columbia steelhead. *See* 2008 BiOp, 8-37; RPA Table at 57-58 (RPA 41, Table 7).

the RPAs. For example, the MOA with the Colville Tribes requires funding of three of the “conservation programs” identified in RPA 42. *Compare* BiOp, RPA Table at 60 with Colville MOA (Corps AR A.394) at B-5 – B-6.

It was reasonable for NOAA to conclude that the RPA hatchery actions funded by the Colville MOA would positively contribute to the survival and recovery of upper Columbia River spring Chinook and steelhead. These future hatchery actions include:

- Expansion of the Colville Tribes’ local steelhead broodstock program from 20,000 to 230,000 smolts, thereby eliminating the historical supplementation program that uses non-local, domesticated steelhead production. Based on the latest research, this steelhead hatchery reform program should increase the productivity of hatchery-raised listed steelhead by 200 to 300 percent in the wild. 2008 BiOp, RPA Table at 60; Colville MOA at B-5 and B-6; Okanogan Initiative (Reclamation AR 74611); Smith Decl. ¶ 14.
- Funding of the Colville Tribes’ new steelhead kelt reconditioning program, allowing up to 200 steelhead kelts to be reconditioned and allowed to spawn again in the wild. For the Okanogan population, located above nine mainstem dams, kelt reconditioning holds significant promise for increasing natural production through repeat spawning of fish that have demonstrated successful life-history. The Tribes have already documented natural production of progeny from reconditioned kelts in Omak Creek. 2008 BiOp, RPA Table at 60; Colville MOA at B-5 and B-6; Smith Decl. ¶ 15.
- Funding to construct and operate the Colville Tribes’ planned Chief Joseph Hatchery. Construction is expected in 2010 with full operations in 2012. The Tribes will reintroduce spring Chinook smolts produced at the hatchery from local broodstock into restored historical habitats in the Okanogan Basin where these fish are now extinct. The

reintroduction of spring Chinook into the Okanogan River will increase the abundance, distribution, and diversity of this ESU, in addition to the recovery efforts for the three extant populations.²⁰ 2008 BiOp, RPA Table at 60; Colville MOA at B-1 – B-2, B-6 – B-7; Smith Decl. ¶¶ 16-17.

As is evident, the kinds of MOA-funded actions described above are both causally linked to proposed FCRPS operations and “reasonably certain to occur.” NOAA did not err by qualitatively considering their effects in its jeopardy analysis.

C. The Habitat Benefits Provided for in the RPAs and MOAs Are “Reasonably Certain to Occur.”

Plaintiffs further allege that the jeopardy analysis improperly relies on the beneficial effects of non-federal habitat actions that are not “reasonably certain to occur.” NWF Brf. at 22-27. Citing to the Court’s analysis of the 2000 BiOp, *NWF*, 254 F.Supp.2d at 1213-14, plaintiffs allege that the 2008 BiOp “repeats many of the same mistakes the agency made in the 2000 BiOp.” NWF Brf. at 22. The record belies this assertion.

In the 2000 BiOp, NOAA relied largely on the Basinwide Salmon Recovery Strategy (BSRS) which included a variety of non-federal mitigation actions designed improve habitat. *NWF*, 254 F.Supp.2d at 1213. While the 2000 BiOp relied on the BSRS, it acknowledged that the “degree to which the BSRS would ensure a high likelihood of recovery of each ESA [was] uncertain” and proposed to remedy this deficiency through an evaluation and monitoring

²⁰ Section 7 consultation was completed for this hatchery on July 28, 2008. http://www.efw.bpa.gov/environmental_services/Document_Library/Chief_Joseph/NOAA_Fisheries_Biological_Opinion_0708.pdf

program. *Id.* at 1215. The Court concluded that the evaluation monitoring program, while “laudable,” did not make the mitigation actions “reasonably certain to occur.”²¹ *Id.*

The Court’s opinion invalidating the 2000 BiOp relied heavily on *Center for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139 (D. Ariz. 2002). In *Rumsfeld*, the Court held that mitigation measures must be: (1) reasonably specific, certain to occur, and capable of implementation; (2) subject to deadlines or otherwise-enforceable obligations; and (3) address the threats to the species in a way that satisfies ESA standards. *Id.* at 1152. The Court applied these standards to overturn a BiOp relating to groundwater pumping at an Army base where the BiOp did not require the Army to reduce its pumping by “any particular amount” or to achieve “measurable goals” with respect to water recharge. *Id.* at 1153. Instead, the mitigation measures in the BiOp were “merely suggestions” that did not establish which projects had to be undertaken, the conservation objectives for the respective projects, or a “date certain implementation requirement.”²² *Id.*

In *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 355 (E.D. Cal. 2007), the Court similarly held that a mitigation strategy “must have some form of measurable goals, action measures, and a certain implementation schedule; i.e., that mitigation measures must incorporate *some* definite and certain requirements that ensure needed mitigation measures will be implemented.” *Id.* The Court went on to hold that an adaptive management process that

²¹ The Court cited with approval the State of Oregon’s position that “reasonable certainty” requires: (1) necessary funding is available; authority for the proposed actions; and (3) binding agreements. *NWF*, 254 F.Supp.2d at 1213.

²² The mitigation provisions in the final BiOp compared unfavorably with RPAs in a draft BiOp that was never adopted. *Rumsfeld*, 198 F.Supp.2d at 1150. The draft BiOp would have required the Army to prepare a plan to balance its water use with recharge and required a schedule for implementation of measures that would reduce groundwater withdrawals to a level less than or equal to recharge. *Id.* The draft BiOp also contained a list of specific measures the Army would be required to consider in developing a plan to balance water use with recharge. *Id.*

formed the basis for a no jeopardy determination was inadequate because it contained “no quantified objectives or required mitigation measures.” *Id.* at 356. Furthermore, while BiOp required that “the process must be implemented by holding meetings and making recommendations, nothing requires that any *actions* ever be taken.” *Id.*

The habitat actions in the 2008 BiOp address the key deficiencies identified by these decisions. The future habitat actions considered in the BiOp are “reasonably specific, certain to occur, and capable of implementation.” *Rumsfeld*, 198 F. Supp. 2d at 1152. After 2009,²³ these include:

- Hard funding commitments (\$45 million annually for tributary and estuary projects between 2011 and 2017). BA (NOAA AR B.89) at 2-37.
- Quantified population-specific targets for habitat quality improvements. 2008 BiOp, RPA Table at 41; BA at 2-37. Specific targets are set forth in Table 5 to the RPA Table of Actions. 2008 BiOp, RPA Table at 44-46.
- A specific process to identify and select projects necessary to meet the above habitat improvement targets. Expert panels will estimate habitat quality improvements associated with projects in advance of project selection. Projects will be selected from project categories previously identified to meet the needs of particular ESUs and populations. The process will prioritize projects based on the populations with greatest biological need. Project selection will be informed by the experts’ determination of anticipated changes in habitat quality and in coordination with recovery planning groups

²³ Plaintiffs acknowledge that for the years 2007 through 2009, the Action Agencies will fund and implement specific, identified habitat projects. NWF Brf. at 23; 2008 BiOp, RPA Table at 40; BA (NOAA AR B.89) at 2-36. If specific projects cannot be implemented, the Action Agencies commit to substitute a project or projects to achieve equivalent survival benefits. 2008 BiOp, RPA Table at 40; BA at 2-36.

and the Northwest Power and Conservation Council. 2008 BiOp, RPA Table at 41-42; BA at 2-36.

- A specific process for reviewing compliance and implementation of projects every three years and a commitment to implement substitute projects of equal value in the event previously selected projects are insufficient to ensure satisfactory progress in meeting the habitat improvement targets. 2008 BiOp, RPA Table at 41-43; BA at 2-36 and 2-37.
- An on-going commitment to research, monitoring and evaluation during implementation that will inform future project selection. 2008 BiOp, RPA Table at 81-87; BA at 2-59 and 2-60.

These habitat improvement RPAs are not “merely suggestions” -- they are mandatory requirements that are backed up by hundreds of millions of dollars in funding commitments. *See* BA (NOAA AR B.89) at 2-37. Moreover, the BiOp requires the Action Agencies to select projects to achieve “measurable goals” and “quantified objectives” for habitat quality improvements that are specific to each population. 2008 BiOp, RPA Table at 41 and 44-46 (Table 5); BA at 2-37. While every one of the hundreds of specific projects that will be implemented over the next 10 years obviously cannot be identified in advance, the BiOp requires a rigorous, scientifically based process for selecting projects from predetermined project categories. 2008 BiOp, RPA Table at 41-42; BA at 2-36. Finally, the RPAs are “subject to deadlines and . . . enforceable obligations” that will ensure attainment of the habitat improvement goals by 2017. 2008 BiOp, RPA Table at 41-43; BA at 2-36 and 2-37.

In addition, the habitat actions required by the RPAs are backed up by the Columbia River Fish Accords, legally enforceable agreements between the Action Agencies several tribes and two states that identify and provide additional funding for a number of critical projects that

will significantly improve habitat quality over the ten-year life of the BiOp. For example, the Colville MOA alone increases the habitat and conservation hatchery funding for Upper Columbia steelhead and spring Chinook in the Okanogan basin from about \$500,000 to about \$7.3 million annually, a nearly 14 fold increase.²⁴ Colville MOA (Corps AR A.394), Appendix A; Smith Decl. ¶ 13.

As a further example, the MOA commits the Action Agencies to provide \$4.5 million in funding for the Salmon Creek project which will restore in-stream flows and fish passage through the lower portion of a major, historically productive, tributary of the Okanogan River that has been blocked by irrigation diversions for over a century. Colville MOA (Corps AR A.394) at A-1, B-2 to B-4. This project alone is projected to increase adult returns of UCR steelhead and spring Chinook salmon by many hundreds of fish. *Id.* at B-4. By committing the Action Agencies to fund these and many other specific projects over the next ten years, the Fish Accords provide additional certainty that habitat benefits projected in the BiOp will actually occur.

Plaintiffs argue that the commitment in the RPA to achieve a specific percentage improvement in habitat quality and survival is illusory because “the actual projects that will achieve this improvement have not been identified.” NWF Brf. at 24 (emphasis in original). If plaintiffs are insisting that every one of the hundreds of habitat projects that will implemented pursuant to the RPAs and the Fish Accords over the next ten years be identified in advance, they are demanding the impossible. In any event, plaintiffs cite no authority requiring mitigation

²⁴ By 2017, MOA funding of projects described in the Tribes’ Okanogan Initiative is projected to nearly triple the amount of available steelhead habitat in that basin, from 10.6 miles to 25.6 miles, as well as improving the quality of the habitat. Smith Decl. ¶ 13. Additional MOA funding will also be targeted toward projects to put an additional 27.8 stream miles of historical steelhead habitat back into natural production. *Id.*

measures in a BiOp for an enormously complex ten-year action to provide specificity down to the individual project level. ESA regulations and judicial decisions require only *reasonable* certainty that mitigation measures will be implemented. Indeed, in *Rumsfeld*, 198 F.Supp.2d at 1150, the Court cited with approval a draft BiOp that relied on mandatory performance targets for balancing water use with recharge, while allowing the Army to select from a list of several possible measures to achieve this goal.

As in *Rumsfeld*, “reasonable certainty” can be attained here through a planning process backed by funding commitments, performance targets, and mandatory timelines without identifying in advance every single habitat improvement project that will be implemented over the next ten years.²⁵ Furthermore, these funding commitments, performance targets and timelines are backed up by enforceable agreements that commit hundreds of millions of dollars toward specific habitat improvement projects.²⁶ Plaintiffs’ argument that the 2008 BiOp is legally deficient because every habitat project that the Action Agencies will fund in the Columbia Basin over the next ten years has not been identified in advance is without merit and should be rejected.

²⁵ Plaintiffs’ argument that the “2008 BiOp provides no additional assurance that the actions themselves will occur,” NWF Brf. at 24, ignores the funding commitments, the science-based project selection process, and the three-year review process that will ensure that the agencies remain on track toward meeting the habitat improvement goals.

²⁶ Plaintiffs maintain that the MOAs “do not solve the problem” because NOAA did not have sufficient information at the time the BiOp was released to “characterize the incremental benefit” of the actions in the MOAs. *Id.* at 24 n.18. But the alleged “problem” raised by plaintiffs is not a deficiency concerning the proper quantification of benefits, but a purported lack of certainty in identifying and implementing projects. Plaintiffs also maintain that the MOAs “do not guarantee that any specific projects will occur because funding for these projects must still be approved by the Northwest Power and Conservation Council.” NWF Brf. at 24 n.18. However, the Colville MOA expressly requires BPA to “provide expense and capital funding for the ESA-focused habitat projects” identified in the agreement. Colville MOA (Corps AR A.394) at 8. Although the Council and its science panel may review these projects and provide recommendations, funding for the projects themselves may be adjusted only if both the Tribes and BPA agree to such an adjustment. *Id.* at 12.

D. NOAA’s “No Jeopardy” Determination Was Neither Arbitrary and Capricious Nor Contrary to Law.

Plaintiffs maintain that the 2008 BiOp violates the standards of the Administrative Procedure Act (APA) because of numerous alleged technical flaws in the jeopardy analysis. *See* NWF Brf. at 29-40; Oregon Brf. at 16-32. Rather than relying on the record, plaintiffs and the State of Oregon rely on almost 300 pages of extra-record declarations from their hired experts to support their arguments. Neither plaintiffs nor the State of Oregon have sought leave of Court to supplement the administrative record. The only legal basis asserted for filing this material is contained in a brief footnote in plaintiffs’ summary judgment memorandum which maintains that the material has been offered to help the Court “determine what factors are relevant to the agency’s decision.” NWF Brf. at 30, n. 24. Plaintiffs’ seriously misapprehend the role of the Court in an APA judicial review proceeding.

Administrative review disfavors consideration of extra-record evidence. *Northwest Environmental Advocates v. National Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985)). In limited circumstances, district courts are permitted to admit extra-record evidence: (1) if admission is necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith.” *Id.* at 1145 (quoting *The Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)). However, a court may not consider extra-record testimony “elicited for the purpose of determining the scientific merit of the [agency] decision.” *Ranchers Cattlemen Action v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1117 (9th

Cir. 2007) (quoting *Asarco, Inc v. EPA*, 616 F.2d 1153, 1160 (9th Cir.1980)). “Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making.” *Powell*, 395 F.3d at 1030.

Plaintiffs’ extra-record evidence cannot possibly meet these standards. It is difficult to fathom why, under any circumstances, a court would need to review 300 pages of highly technical declarations to determine whether an agency considered all relevant factors or adequately explained its decision. Rather, it is obvious that plaintiffs are proffering the declarations to attack the scientific merits of NOAA’s technical judgments.²⁷ For example, the 126-page Bowles Declaration submitted by the Oregon includes a lengthy effort to reanalyze the population data presented in the 2008 BiOp using different methods and assumptions. *See, e.g.*, Bowles Decl. 23-36 (reanalyzing population trends).

Plaintiffs offer no explanation for why these technical materials were not presented to NOAA during the public comment period on the draft BiOp. *See Powell*, 395 F.3d at 1029 n.10 (“Normally, if an Agency’s administrative record is incomplete, we would expect litigants to seek to supplement the record in the agency before seeking to expand the record before the district court”). If they had been presented during the public comment period, these materials and the agency’s response to them would have been properly before the Court. Because

²⁷ Indeed, Plaintiffs have already unsuccessfully moved the Court to appoint a panel of experts to review the merits of NOAA’s scientific analysis. Failing to obtain Court appointment of a panel of scientists, plaintiffs now submit massive volumes of scientific testimony and ask the Court itself to directly pass judgment on the merits of the parties’ competing science. But, as the Ninth Circuit has now made clear, this is not a proper role for a reviewing court. *McNair*, 537 F.3d at 988.

plaintiffs' APA arguments are based almost entirely on extra-record declarations, the arguments should be rejected and the declarations stricken.²⁸

E. Plaintiffs' Critical Habitat Arguments Are Inconsistent with the Section 7 Process.

Plaintiffs also challenge NOAA's analysis of the effects of the proposed action on critical habitat. NWF Brf. at 40-48. While the statutory basis for this challenge is unclear, plaintiffs appear to argue that NOAA erred by using status quo habitat conditions as a reference point for assessing whether the proposed action would result in "destruction or adverse modification," instead of comparing the proposed action to desired future conditions necessary to support species recovery. *Id.* at 42 (criticizing NOAA's analysis because it "centers on the status quo rather than on critical habitat's role in promoting recovery"). Under plaintiffs' theory, if continued operation of the hydropower system means that habitat is insufficient to support full recovery, *even if the habitat conditions are improved from current conditions*, a "destruction/adverse modification" finding would be mandated. *Id.*

Plaintiffs' critical habitat argument thus suffers from the same basic flaw as its jeopardy argument – both arguments impose affirmative recovery obligations on the Action Agencies instead of a negative obligation to avoid "jeopardy" and "destruction or adverse modification" of critical habitat. Plaintiffs' position finds no support in the statutory or regulatory language. Under Section 7(a)(2), an action agency must insure that its actions are not likely to "*result* in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). The ESA regulations define "destruction or adverse modification" as "direct or indirect

²⁸ If the Court chooses to consider plaintiffs' declarations, it should also consider the Declaration of Stephen H. Smith filed herewith, along with additional declarations that will be filed by the defendants and intervenors. Mr. Smith's declaration shows that, at least for the Okanogan basin, the BiOp significantly *underestimates* the likely benefits of future habitat and hatchery actions that are "reasonably certain to occur" under the Colville MOA. Smith Decl. ¶¶ 22-24.

alteration that *appreciably diminishes* the value of critical habitat for both the survival and recovery of a listed species.” 50 C.F.R. § 402.02 (emphasis added). Just as “[a]gency action can only ‘jeopardize’ a species’ existence if that agency action causes some deterioration in the species’ pre-action condition,” an action “appreciably diminishes the value of critical habitat” only when it would result in some *additional* or *new* harm to the function of that habitat. *NWF*, 524 F.3d at 930.

To be sure, NOAA must consider whether an agency action affects critical habitat needed for recovery of the listed species. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 384 F.3d 1059, 1069-71 (9th Cir. 2004).²⁹ But as the Ninth Circuit has made clear, applied to continuing operations, this requirement “simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, *by tipping a listed species too far into danger.*” *NWF*, 524 F.3d at 936 (emphasis added). Properly understood, this language means that an agency may not continue actions that adversely affect critical habitat if maintaining the status quo would cause *further harm* to the species, for example, by continuing the species on a downward spiral toward extinction. *See Nez Perce Tribe v. NOAA Fisheries*, 2008 WL 938430 *8 (D. Id. 2008) (status quo operation of a federal irrigation project would result in destruction of critical habitat because it would maintain the creeks as “population sinks, where mortality exceeds reproduction”).

Plaintiffs’ acknowledge that, in contrast to the situation in *Nez Perce* at *8, the 2008 BiOp requires that critical habitat must be maintained in a condition that allows an ESU to “detectably increase its population from current levels.” *NWF Brf.* at 42 Plaintiffs, however,

²⁹ In *Gifford Pinchot Task Force*, there was no question that Forest Service logging would result in *new* destruction of designated critical habitat, the only issue was whether that critical habitat was necessary for the recovery of the spotted owl. *See* 384 F.3d at 1074

insist on more – they demand that the Section 7 consultation process lead to *restoration* of sufficient critical habitat to support *full recovery*. Plaintiffs’ position would put recovery planning at the forefront of Section 7 consultation process, contrary to the Ninth Circuit’s express directive that importing “ESA’s separate recovery planning provisions into the Section 7 consultation process” would be “improper.” *NWF*, 524 F.3d at 936. Because plaintiffs’ arguments rest on a faulty understanding of the Section 7 process, they should be rejected.

F. Federal Defendants Did Not Violate Section 401(a) of the Clean Water Act.

Under Section 313 of the Clean Water Act (CWA), the Action Agencies are required to comply with State water quality standards and other CWA requirements. 33 U.S.C. § 1323; *see also National Wildlife Federation v. Army Corps of Engineers*, 384 F.3d 1163, 1180 (9th Cir. 2004) (Corps properly concluded pursuant to Section 313 that operation of dams on lower Snake River did not result in violations of State water quality standards). Plaintiffs contend that mere compliance with water quality standards is not enough. Instead, they argue that the Action Agencies must obtain a certification from four States under Section 401(a)(1) of the CWA that operation of water projects on the Columbia and Snake Rivers meets water quality standards and any other “appropriate requirement of State law.”³⁰ *NWF Brf.* at 53. Plaintiffs’ argument is based on the theory that the “ITS [Incidental Take Statement] issued with the 2008 BiOp” is a “federal license or permit” that triggers the Section 401 water quality certification requirement. *Id.* Plaintiffs’ novel theory is unsupported by case authority and would subject federal water

³⁰ Under Section 401(d), a water quality certification must include limitations and other requirements “necessary to assure” that the applicant will comply with CWA standards and limitations “and with any other appropriate requirement of State law.” 33 U.S.C. § 1341(d). This provision authorizes states to condition a permit for a Federally licensed hydroelectric project on the “maintenance of specific minimum stream flows to protect salmon and steelhead runs.” *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 703 (1994). Any limitation or requirement contained in a State water quality certification becomes a condition on any Federal license or permit subject to the certification requirement. *Id.*

management on the Columbia and Snake Rivers to conflicting State and Tribal requirements.³¹

It should be rejected.

1. An ITS Is Not a Federal License or Permit that Triggers the Water Quality Certification Requirement.

The CWA's water quality certification requirement applies only to an "applicant" for a "Federal license or permit" to "conduct [an] activity . . . which may result in any discharge into the navigable waters."³² 33 U.S.C. § 1341(a)(1). The ITS issued with the 2008 BiOp does not trigger the water quality certification requirement because: (1) it is not a license or permit; (2) it does not authorize an activity which may result in a discharge into navigable waters; and (3) the Action Agencies are not "applicants."

a. An ITS Is Not A "License or Permit."

An ITS is not a "license or permit," but instead is an "advisory opinion" that functions as a conditional "safe harbor" immunizing persons from Section 9 liability and penalties for incidental takings of listed species that occur during otherwise lawful activities. *Arizona Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001). The issuance of an ITS is an outcome of the consultation process required by Section 7 of the ESA. Nothing in the ESA suggests that the Section 7 consultation process results in the issuance of a "license or permit." Rather, under Section 7(b)(3), the consultation process culminates in the

³¹ Section 518(e) of the CWA authorizes the Environmental Protection Agency (EPA) to treat Indian tribes as states for the purposes of the Act. 33 U.S.C. § 1377(e). The Colville Tribes and other Indian tribes that are party to this litigation have been recognized as states for the purposes of adopting and enforcing their water quality standards. 40 C.F.R. § 131.35; <http://www.epa.gov/waterscience/tribes/approvable.htm> If plaintiffs' theory is correct, the action agencies will also have to obtain certifications from both affected Tribes and States.

³² EPA regulations define the term "license or permit" as "any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States." 40 C.F.R. § 121.1(a).

issuance of an “opinion . . . detailing how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). If the opinion finds that the proposed action will cause jeopardy or adverse modification, the opinion must “*suggest* those reasonable and prudent alternatives which [NOAA] believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.” *Id.* (emphasis added). NOAA must also provide the action agency with a “written statement” (the ITS) that specifies the impact of the incidental taking, specifies “reasonable and prudent measures” considered necessary to minimize the impact, and sets forth terms and conditions that must be complied with by the agency to implement these reasonable and prudent measures. *Id.* § 1536(b)(4). Under Section 7(o)(2), “any taking that is in compliance with the terms and conditions specified in [an ITS] shall not be considered to be a prohibited taking of the species concerned.” *Id.* 1536(o)(2).

In notable contrast to Section 7, other provisions of the ESA expressly provide for the issuance of a “permit.” For example, under Section 10(a)(1)(A) the Secretary may issue permits authorizing directed takings of listed species for “scientific purposes or to enhance the propagation or survival of the affected species.” 16 U.S.C. § 1539(a)(1)(A). Likewise, under Section 10(a)(1)(B), Congress authorized the Secretary to issue incidental take permits based on approval of a habitat conservation plan. *Id.* § 1539(a)(1)(B). Finally, in Section 9(d), Congress established a permit system for importers and exporters of fish, wildlife, plants and elephant ivory. *Id.* § 1538(d).

Congress’s use of the term “permit” in Section 10 and elsewhere in the ESA demonstrates that it did not intend that the “written statement” provided for in Section 7 would be considered a “license or permit.” Instead, the consultation process was intended to serve as a

cooperative, information sharing system that would enable action agencies to obtain and utilize “the best scientific and commercial data available” in discharging their substantive obligations under Section 7(a)(2). 16 U.S.C. § 1536(a)(2).

Congress certainly could have required that federal agencies obtain an incidental take permit for agency actions that were likely to result in the taking of listed species. Instead of subjecting federal agencies to the Section 10 permit process, Congress chose to hold federal agencies to a *higher* standard -- to “insure” that their actions would not “jeopardize” the continued existence of a listed species or cause the destruction of critical habitat.³³ Congress also established a consultation process to assist federal agencies in meeting this unique obligation. Treating a Section 7 consultation as a kind of permitting process would ignore the special role Congress assigned to federal agencies in achieving the ESA’s goals and objectives.

b. The ITS Does Not Authorize Any Activity Which May Result In A Discharge Into Navigable Waters.

Even if an ITS could somehow be construed as a type of “license or permit,” it provides authority only for the taking of listed species that is “incidental” to “otherwise lawful activity.” 50 C.F.R. § 402.02. An ITS provides no authorization for an action agency to conduct the underlying activity itself.³⁴ *Center for Biological Diversity v. United States Fish and Wildlife Serv.*, 450 F.3d 930, 942 (9th Cir. 2006) (while ITS immunizes action agency or applicant “from

³³ The substantive standards of Section 7 are substantially broader and more rigorous than the Section 9 take prohibition. For example, Section 7 prohibits the destruction of critical habitat even if it does not result in “actual injury” to a member of the listed species. *Cf. Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 708 (1995) (Section 9 take prohibition covers habitat destruction only where it results in “actual injury” to individual member of a listed species).

³⁴ For example, regardless of the issuance of an ITS, the action agency has an independent duty to comply with Section 7 of the ESA. *ALCOA v. BPA*, 175 F.3d at 1161 (action agency “may not escape its responsibility [under Section 7] by simply rubber stamping the consulting agency’s analysis”); *Pyramid Lake Paiute Tribe v. U.S. Dep’t of the Navy*, 898 F.3d 1410, 1415 (9th Cir. 1990) (action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species” by uncritically relying on BiOp and ITS).

the prohibition against take of endangered species,” it does not “relieve the action agency or applicant of its responsibility to comply with all other legal requirements”).

In this case, the ITS issued with the 2008 BiOp does not authorize the Corps and BOR to operate the FCRPS; it simply authorizes the “incidental” take of listed species. But it is the underlying activity – the operation of the FCRPS, not the “incidental” taking of listed salmon and steelhead – that “results in” a discharge to the navigable waters. *State of North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997) (Section 401’s use of the words “result in” requires a showing of causation). Plaintiffs’ argument would lead to the anomalous result that FCRPS operations would be subject to the CWA’s water quality certification requirement *only* when they incidentally affect an ESA listed species.³⁵ Under the CWA, however, application of the water quality certification requirement applies depends on whether the underlying *activity* results in a discharge and requires a federal license or permit, not on whether the activity happens to incidentally affect a listed species. *See PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 712 (1994) (water quality certification requirement applies to “activity” as a whole).

c. The Action Agencies Are Not “Permit or License Applicants.”

Finally, even if an ITS is a “license or permit” that authorizes a discharge, action agencies are not “permit or license applicants.” Under Section 7 of the ESA, a “permit or license applicant” is a *third party* that applies to an action agency for permission to engage in an activity regulated by the action agency. For purposes of Section 7, the ESA defines “permit or license applicant” as “any person whose application to a federal agency for a permit or license has been

³⁵ Under plaintiffs’ theory, existing federal projects were not subject to the water quality certification requirement until the first Snake River ESUs were listed in the early 1990s and would no longer be subject to that requirement after the species are de-listed.

denied primarily because of the application of [Section 7] to such agency action.” 16 U.S.C. § 1532(12). Likewise, under the ESA regulations, an “applicant” refers to any person “who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.” 50 C.F.R. § 402.02. A federal agency does not become a “permit or license applicant” merely by initiating consultation with NOAA or the Fish and Wildlife Service.

In this case, the Corps and BOR did not need to apply to another federal agency for permission to operate the FCRPS. Indeed, each of the dams at issue here was authorized by *Congress* pursuant to the Rivers and Harbors Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10, 16 (1945). *See NWF v. Army Corps of Engineers*, 384 F.3d at 1166. Accordingly, the mere initiation of consultation under Section 7 of the ESA does not convert either of these agencies into an “applicant for a Federal license or permit” within the meaning of Section 401 of the CWA.

d. No Court Has Held that the Issuance of an ITS Triggers the Water Quality Certification Requirement.

Plaintiffs cite no case which holds that the issuance of an ITS triggers the CWA’s water quality certification requirement. Their argument relies instead on *dicta* from two cases that did not even address the CWA. *See NWF Brf.* at 54-55. Neither case supports plaintiff’s position.

In *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997), the Supreme Court held that recipients of water from a federal irrigation project had standing to challenge a BiOp and ITS issued for the project. Although the Court stated in *dicta* that an ITS “constitutes a permit authorizing the action agency to ‘take’ the endangered or threatened species so long as it respects the Service’s ‘terms and conditions,’” the Court acknowledged that the action agency was “technically free to disregard the Biological Opinion and proceed with its proposed action.” *Id.* at 170. If the

agency disregarded the BiOp, however, the Court observed that the agency could be subject to liability if it knowingly took a listed species. *Id.*

Bennett does not establish that an ITS is “permit” in the strict sense used in Section 401(a) of the CWA. A “written statement” that an agency is “technically free” to disregard is more aptly characterized as a “safe harbor” than a permit.³⁶ *See Arizona Cattle Growers*, 273 F.3d at 1239. At any rate, *Bennett* is entirely consistent with the view that an ITS merely provides conditional authorization to “take” a listed species if such takings are “incidental” to an otherwise lawful activity. *Bennett*, 520 U.S. at 170. Nothing in *Bennett* suggests that the ITS operates as a permit authorizing the underlying *activity* itself.

In *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996), the Ninth Circuit concluded that the issuance of an ITS for a State-Tribal fishing plan constituted “major federal action” for the purposes of the National Environmental Policy Act (NEPA). The Court suggested that the ITS was “functionally equivalent” to a permit for the purposes of NEPA because salmon fishing would “for practical purposes” be prohibited but for the ITS. *Id.* at 444. Notably, however, the Court did not hold that an ITS is *legally* equivalent to a “permit.” Indeed, in the first part of its opinion, the Court held that an incidental take permit issued under Section 10(a) of the ESA was *not* required for the activity in question. *Id.* at 440-42. Thus, while the issuance of an ITS in some cases will cross the “major federal action” threshold of NEPA, this does not establish that an ITS is a “Federal license or permit” within the meaning of Section 401(a)(1) of the CWA.

³⁶ Notwithstanding plaintiffs’ suggestions to the contrary, there is a legally significant difference between a “safe harbor” and a “permit.” *See* NWF Brf. at 55 n. 38. Violation of a permit directly results in civil and criminal liability under the CWA or ESA. *See* 16 U.S.C. § 1540(a), (b); 33 U.S.C. § 1319(a)(3), (c) and (g). By contrast, an agency that disregards an ITS would not be directly liable for a permit violation, but would be liable for violation of the ESA “take” prohibition only if it could be proven that the agency knowingly “took” an individual from the listed species. *Bennett*, 520 U.S. at 170 (citing *Babbitt*, 515 U.S. at 708).

In short, the ITS accompanying the 2008 BiOp serves as a conditional “safe harbor” immunizing the action agencies from liability under Section 9 of the ESA for any “take” of listed species that is “incidental” to the otherwise lawful operation of the FCRPS. It is not a “license or permit” that authorizes any activities that may result in a discharge to the navigable waters. Furthermore, neither the Corps nor the BOR can fairly be viewed as a “license or permit applicant” under either Section 7 of the ESA or Section 401(a)(1) of the CWA. Accordingly, the Action Agencies were not required to obtain water quality certifications as a prerequisite for operation of the FCRPS.

2. Application of the CWA Certification Requirement to Federal Water Projects on the Columbia and Snake Rivers Would Lead to New Interstate Conflicts over Water Management and Allocation.

Plaintiffs’ novel theory that an ITS is a “Federal license or permit” that triggers the CWA water quality certification requirement, if adopted by the Court, would be inconsistent with the collaborative process established by the Court in its remand orders and expose the federal Columbia River water management system to a welter of conflicting State and Tribal directives. Water quality standards promulgated by different states and tribes are not required to be consistent with each other. Indeed, under Section 510(1) of CWA, states (and tribes eligible for treatment as states) are free to set water quality controls that are stricter than those required by federal law. 33 U.S.C. § 1370(1); *PUD No. 1*, 511 U.S. at 705. Nevertheless, Section 401(d) of the CWA empowers each State (or Tribe) where a discharge originates to unilaterally condition a Federal license or permit to assure compliance with its water quality standards. 33 U.S.C. § 1341(d); *PUD No. 1*, 511 U.S. at 703.

Even if standards are similar, there are bound to be differences in interpretation in the application of these standards. Section 401(d) authorizes States to set and enforce minimum

flow requirements to protect “designated uses” such as “salmonid migration, rearing, spawning and harvesting” and “aesthetics.” *See PUD No. 1*, 511 U.S. at 714, 716. As this litigation amply demonstrates, there is certainly disagreement among different states, tribes and the federal government about the appropriate flows in the Columbia River needed to protect “salmonid migration, rearing and spawning,” not to mention other designated uses.

In addition, different sovereigns are likely to assign priority to different designated uses. For example, the Colville Tribes desire to limit the drawdown of Lake Roosevelt to protect designated uses identified in their own water quality standards, including ceremonial and religious uses, recreational uses, and protection of resident fish and wildlife. *See* 40 C.F.R. § 131.35(f)(2), (h)(2). The State of Oregon, by contrast, would likely put greater priority on enhancing flows in the lower Columbia River to aid in the outward migration of juvenile salmonids.

If, as plaintiffs’ posit, each State (and each Tribe eligible for treatment as a state) has the power to unilaterally condition the operations of those discrete portions of the larger Columbia River system under their jurisdiction, federal agencies would become subject to a plethora of conflicting requirements, each designed to serve the narrow, provincial interests of individual states and tribes. The CWA itself provides inadequate guidance for how such conflicts could be addressed. While Section 401(a)(2) of the CWA provides for review by EPA whenever a discharge affects water quality in more than one state, 33 U.S.C. § 1341(a)(2), the CWA provides no mechanism for resolving conflicts between conditions included in water quality certifications issued by upstream and downstream (much less neighboring) states on discrete aspects of an interstate river system managed in large part by the federal government. However

these conflicts would be ultimately resolved, costly litigation among the various sovereigns would appear to be inevitable.³⁷

It is worth noting that the impact from extending the State water quality certification requirements to federal water projects would by no means be limited to the Columbia River. Other major interstate river systems are regulated by multi-state, federal water protects that affect ESA listed species. *See In Re Operation of Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 2008 WL 4417227 (D. Ariz. 2008). Conflicts over river flows and interstate water allocations are already endemic in these other river systems. *See, e.g., Arizona v. California*, 373 U.S. 546 (1963). Plaintiffs' novel CWA theory could easily lead to entirely new conflicts in not only in the Columbia River Basin, but in these other river systems as well.

It is highly unlikely that Congress intended to open a new forum for conflicts over management of interstate river systems when it adopted Section 401 of the CWA. If Congress wanted to require existing federal water projects on interstate waterways to obtain state and tribal water quality certifications it certainly could have said so explicitly.³⁸ Plaintiffs' reading of Section 401, which would impose a water quality certification requirement on otherwise exempt operations of federal water projects based on the presence of ESA listed species, is not consistent

³⁷ Absent a statutory dispute resolution mechanism, conflicts between states over conflicting water quality requirements probably would have to be resolved by the United States Supreme Court. *See Arkansas v. Oklahoma*, 503 U.S. 91, 98-99 (1992).

³⁸ Plaintiffs' maintain that there is "nothing unusual" in requiring the action agencies to obtain state water quality certifications because such certifications are already required for private dams. NWF Brf. at 56. Plaintiffs willfully ignore the central role that federal water projects play in the management of interstate waters in the Western United States. Subjecting existing federal water projects to State water quality certification requirements would not only be highly "unusual," it could lead to a whole new round of water litigation that could reopen previously settled interstate water allocation decrees.

with the language of the statute or Congress's intent. The Court should deny plaintiffs' motion for summary judgment and grant summary judgment for the defendants.

IV. CONCLUSION

ESA litigation over the operation of the FCRPS has been pending almost continuously since the first listings of Snake River salmonids in the early 1990s. Plaintiffs' litigation has led to major improvements in the management of the hydropower system and federal commitments of hundreds of millions of dollars for habitat restoration and hatchery reforms. The litigation, however, has reached a point of diminishing returns. Plaintiffs' arguments have become hyper-technical as the major flaws evident in previous BiOps have been remedied. Although the alleged flaws in the BiOp have grown smaller, the relief plaintiffs seek sought grows more extreme and the requested involvement of the Court in the day-to-day management of the FCRPS grows deeper.

The 2008 BiOp is only a ten-year plan. There will be reassessments every three years and opportunities to demand re-initiation of consultation if the status of the listed species worsens. The Action Agencies have worked hard to collaborate with affected states and tribes and have backed up this collaboration with enforceable agreements. It is time to end this litigation and give the BiOp and the Columbia River Fish Accords a chance to work.

Dated this 24th day of October, 2008.

ZIONTZ, CHESTNUT, VARNELL,
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CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 100.13(c) and FRCP 5(d), I hereby certify that on the 1st day of July, 2008, the foregoing *Amicus Brief of Colville Tribes in Support of Defendants' Motion for Summary Judgment* was filed with the Court's electronic filing system which will generate automatic service upon all parties enrolled to receive such service. In addition, a true and correct copy of the foregoing will be manually served via first class U.S. mail to the following at the addresses set forth below:

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